

De Facto Guardian and Abortion: A Response to the Strongest Violinist Stephen Wagner, for the Justice For All Philosophy Team

Posted for Public Discussion on 4/13/2013 at Life Report's Blog. See www.jfaweb.org/DFG.

Note: The discussion of the bodily rights arguments in general, and the “right to refuse” in the case of rape in particular, has dominated much of the intellectual discourse at Justice For All (JFA) from 2009 until the present. Various small groups have worked on the problem at various times. Some ideas have been written up in unpublished papers and others have been floated in small group discussion, so it’s difficult to trace who had which idea when. I am writing my thoughts on the matter, but because of the community nature of the genesis of the ideas, the other members of the JFA Philosophy Team deserve much of the credit here. Although every member of the JFA Certification Community through the years has participated in the discussion of these ideas to some degree and helped develop the ideas in this paper, the people most involved were (in alphabetical order) Josh Brahm (Right to Life of Central California), Timothy Brahm (JFA Staff), Jacob Burow (JFA Staff), Tony George (former JFA Intern), Trent Horn (now with Catholic Answers), Matthew McKinley (now with FOCUS), Joanna Wagner (JFA Staff), myself, and Catherine Wurts (JFA Staff). Timothy Brahm and Josh Brahm deserve special mention as the people most engaged in helping put this paper in the current form for publishing. Special thanks to RLCC’s Life Report blog for hosting ongoing discussion. Finally, JFA has thousands of dedicated volunteers and financial supporters. JFA’s work and this discussion would simply be impossible without each one of them.

– Stephen Wagner, Director of Training, Justice For All

Contents

- I: The Story
 - a. The Cabin in the Blizzard
 - b. The “Formula” Case: Moral Intuitions
 - c. The “No Formula” Case: Moral Intuitions
 - d. Legal Intuitions
- II: Making Sense of Our Intuitions
 - a. De Facto Guardian
 - b. The De Facto Guardian’s Legal Obligations
- III: The Cabin in the Blizzard Story: An Analogy to Pregnancy
 - a. Pregnancy from Rape
 - b. “If the child dies, you’ll be rescued immediately.”
 - c. Severity of Burden: Is Breastfeeding Similar to Pregnancy?
 - d. The “This Looks a Whole Lot Like Pregnancy” Case
 - e. The “This Is Worse Than Pregnancy” Case
 - f. Outside or Inside the Womb?
- IV: Background: Two Kinds of Bodily Rights Arguments
 - a. The “Sovereign Zone” Argument
 - b. The “Right to Refuse” Argument: The Violinist
- V: Responding to the Right to Refuse Argument (The Violinist)
 - a. Parallels that Aren’t Parallel
 - b. Three “Parallels that Aren’t Parallel”
 - c. Another “Parallel that Isn’t Parallel”
- VI: Tying Our Hands Behind Our Backs: Responding to LRRR
 - a. The Legal Right to Refuse in the Case of Rape (LRRR)
 - b. Parallels that Aren’t Parallel...In Most Cases...It Depends.
 - c. One More Parallel that Isn’t Parallel...in Any Case
 - d. Is Pregnancy More Like Feeding or Kidney Dialysis?
 - e. Conclusion: The Pregnant Woman Is Obligated to Stay Pregnant
- VII: Taking Our Hands Out from Behind Our Backs: Making the Cabin Story More Like Pregnancy and Abortion
 - a. What If Mary Did Find Her Child in the Cabin?
 - b. What If Mary Decided to Slice Up the Child?
 - c. What If Mary Consented to Be a Part of the Experiment with Full Disclosure?
- VIII: Communication Tips: *De Facto Guardian* and *Up*



I: The Story

Ia. The Cabin in the Blizzard

Imagine that a woman named Mary wakes up in a strange cabin. Having gone to sleep in her suburban home the night before, she starts to scream frantically. She goes to the window and sees snow piled high. It appears she is snowed in. On the desk by the window, she finds a note that says,

“You will be here for six weeks.
You are safe, and your child is, too.
There is plenty of food and water.”

Since she just gave birth a week ago, she instinctively begins tearing through each room of the cabin looking for her infant son. She finds an infant in a second room, but it is not her infant. It is a girl who appears to be about one week old, just like her son. Mary begins to scream.

Pulling herself together, she goes to the kitchen area of the cabin and finds a huge store of food and a ready source of water. The baby begins to cry, and she rightly assesses that the baby is hungry. Mary sees a three-month supply of formula on the counter in the kitchen area.

Now, imagine that the police show up at the cabin six weeks later, and Mary emerges from the cabin. After determining she is in good health, albeit a good bit frazzled, one policeman says, “We’ve been investigating this situation for some time. The Behavioral Psychologists from the nearby University of Lake Wobegon are responsible. We’ll bring them to justice. We’re so glad you’re okay. Is there anyone else in the cabin?”

Mary said quietly, “There was.”

“There was?” The police hurry past her to the cabin. They search the cabin and find the infant formula unopened on the counter. They find the infant dead on a bed. The coroner confirms that the infant died from starvation.¹

¹ Some readers will notice that the “Cabin in the Blizzard” story is similar to Frank Beckwith’s story of Alice in *Defending Life* (pp. 195) and Rich Poupard’s story of the woman in the cabin in “Suffer the Violinist.” I read (and others on our team read) both pieces prior to the writing of this piece, although not in direct connection with the construction of the “cabin in the blizzard” story. I credit Professor Beckwith and Dr. Poupard with the kernel of the idea in the thought experiment here presented, and I credit Dr. Poupard with many of the particulars (notably, the variables of the snowstorm and infant formula) that wove their way into my own storytelling as I sought to use the cabin idea for a somewhat different purpose here. See Frank Beckwith, *Defending Life: The Moral and Legal Case Against Abortion Choice* (New York: Cambridge University Press, 2007), pp. 195ff; and Rich Poupard, “Suffer the Violinist: Why the Pro-Abortion Argument from Bodily Autonomy Fails” (Christian Research Journal, Volume 30, No. 4, 2007), pp. 4-5.



Ib. The “Formula” Case: Moral Intuitions

Surely we have great sympathy for Mary. We can imagine how difficult it must have been for Mary to be kidnapped, be separated from her child, be placed with a needy child, and be in this situation for six weeks. Clearly, the behavioral psychologists are most at fault here, but what about Mary? Did Mary do something wrong?

I take it to be a basic moral intuition that what Mary did (or, more precisely, Mary’s refraining from doing something) in the cabin was seriously wrong. She has a moral obligation to feed the child.

Ic. The “No Formula” Case: Moral Intuitions

Now, imagine that everything in the story above is exactly the same, except for one detail: When Mary goes looking for food for the infant, she finds no food suitable for the one-week-old infant. Remember, she is lactating. She can breastfeed the child.

Six weeks later she emerged from the cabin. She confessed that she knew she could have breastfed the child, but the emotional strain of being locked in the cabin was too great, and she just refused to do it.

What’s your moral intuition about her actions in this case? If you think she did not have a moral obligation to feed the child, then you will need to explain why this “no formula” case is different from the “formula” case. The food is administered by a body part in both cases. In the “no formula” case, the food is administered by a more intimate body part and comes from within the woman’s body. Those appear to be the only differences. But how can these differences change whether or not the woman has a moral obligation to feed the child?²

If you have the same intuition I have, that Mary has the same moral obligation to feed the child in both the “formula” and “no formula” cases, then it appears that the woman’s very real bodily rights claims don’t include the right to withhold feeding from the child, even if it’s an intimate body part that must be used for that feeding.

Id. Legal Intuitions?

While discussion of moral intuitions is common among philosophers, I am not aware of much discussion of “legal intuitions.” Humor me for a moment, though. What are your intuitions about what the law should be in the cases above? My intuition is that whatever the law actually is currently, Mary’s moral obligation to feed is so weighty that it should be a legal obligation as well.³ It should not be legal for Mary to do what she did.

² To the person who believes Mary is not obligated to breastfeed based on the fact that breastfeeding uses a more intimate body part than feeding with formula, Josh Brahm asks, “Is it *so* much more intimate that it literally means in one case we would charge her with some kind of crime for starving the child and in the other case we would say she did nothing wrong? I’m agreeing that breastfeeding is more intimate but I’m not convinced that it’s *so* much more intimate that it legitimizes the starvation of a child.”

³ I am not here seeking specificity about the way in which the moral obligation is “so weighty that it should be a legal obligation.” Whether moral obligations differ by type (e.g. those that relate to private virtue cannot be placed into law, those that relate indirectly to the common good might be placed into law but also might



Sure, the law may not rule on such obscure cases, but if we imagine a world in which the “Cabin” case is not rare but is actually common, we can easily imagine the need to make a law demanding that Mary feed the child. If our moral intuitions are a guide for making law, it would be reasonable to expect people in Mary’s situation to feed the child and subject them to punishment if they do not.

II: Making Sense of Our Intuitions

Ila. De Facto Guardian

What are we to make of our moral intuitions about the “Cabin in the Blizzard” case? Why is Mary obligated to feed the child? Mary doesn’t have a parental obligation to the child in any sense. It is neither true that she *consented* to take on a parental obligation, nor is it true that she is *biologically related* as the child’s parent and therefore has a parental obligation.

The mode of killing doesn’t seem relevant either. It seems wrong both for Mary to bring about the child’s death by withholding breast milk and through some more direct killing method like slitting the throat. If anything, withholding breast milk is bad, and slitting the throat is either equally bad or worse.

Rather, a few other factors do seem relevant:

1. Mary is the only person in the immediate geographical vicinity of the child.
2. She is able to help the child.
3. The help the child needs is food and shelter.

Change any one of these, and Mary’s moral obligations seem more uncertain.⁴ If there had been lots of people around, perhaps her obligation is less clear. If she had been disabled in some way that made feeding the child impossible, her obligations seem less clear. If the child had needed some sort of help that goes beyond food and shelter, her obligations seem

not be, and those that directly relate to the common good must be placed into law) or by degree (e.g. this obligation regards such a weighty matter, such as killing a human, so it must be reflected in law, while this other obligation regards such a light matter by comparison, such as complaining about bad weather, that it cannot be reflected in law) is an interesting question, but I am not implicitly making an assertion about which of these theories, or some other theory, is correct. I am simply trying to capture that while it may be questionable whether or not some moral obligations can or should be placed into law, the moral obligation to feed the child in the Cabin in the Blizzard case for whatever reason (perhaps unclear to us) is the sort of obligation that seems rightly to fall within the purview of the law if for no other reason than it seems indistinguishable from other cases of killing which are more familiar to us.

⁴ I think I’m making an epistemological point here rather than an ontological one. In other words, I think I’m saying that if one of these three factors were not present, the moral obligation may not be available to us to know. I think that doesn’t mean the existence of the moral obligation (whether there is a right or wrong in that particular case) is necessarily in doubt.



less clear. Yet, if all three of the three factors in the list above are in place, Mary's moral obligation is obvious: she should feed the child.

What's going on here? My colleague Timothy Brahm and I, in trying to put our finger on what seems to be happening in her case, called her a *de facto guardian*.⁵ It just happens to be the case, for whatever reason, that Mary is now in a situation in which she is the only person in the vicinity who can help a child in need. It's as if Mary is now situated the same way a parent or guardian is situated most of the time, but in Mary's case, it's by accident. Finding herself situated as a parent, she now shoulders the *same obligations of a parent or guardian*, and in her case, temporarily. It's as if the obligations slipped over onto her by the accident of the situation.

IIb. The De Facto Guardian's Legal Obligations

A parent's moral obligations, at least for feeding and sheltering their children, are so strong that we say there should also be laws forcing parents to do these things. If the moral obligations of a *de facto guardian* like Mary are simply the same obligations of a parent, yet temporary, then they must also be legal obligations. In other words, it should not be legal for a person in the *de facto guardian* position to neglect the feeding and sheltering of the child.

III: The Cabin in the Blizzard Story: An Analogy to Pregnancy

IIIa. Pregnancy from Rape

Because the "Cabin in the Blizzard" story is similar to pregnancy from rape in all of the morally relevant aspects, it can help shed light on the moral obligations a woman has when she is pregnant from rape.

First, let's assume for the sake of the argument that the unborn is a living human organism with the same basic rights as other human organisms. If that's the case, note how Mary's situation in the "no formula" case is similar to pregnancy in the case of rape. Mary didn't do anything to put herself in the situation in which she now finds herself, with a child totally dependent on her body for survival. Similarly, the woman pregnant from rape didn't do anything to put herself in the situation, but she now has a child totally dependent on her body for survival. Both Mary and the woman pregnant from rape are *de facto guardians*, and as such, they both have the obligation (moral and legal) to feed and shelter the children in their care, regardless of the fact that they didn't consent to be in the situation they are in.

Put differently, if Mary has an obligation (moral or legal) to feed the child in the cabin using an intimate body part (the breast), and the cabin and pregnancy cases are similar in the

⁵ I am aware that the term, *de facto guardian*, has precise legal meaning in some countries and contexts. I am not using the term to bank on the capital of these legal meanings. I am using it strictly philosophically, to attempt to put into words what seems to be happening with our intuitions in the Cabin case.



relevant details, then the woman pregnant from rape also has the obligation (moral or legal) to feed her child using an intimate body part (the uterus).

If that's the case, then abortion is not the right thing to do in the case of rape, and it should not be legal.

IIIb. "If the child in the cabin dies, you'll be rescued immediately."

Some will object that when a woman is pregnant and considering abortion, it's different than the "Cabin in the Blizzard" story because abortion frees the woman from the burden of pregnancy. Let's adjust Mary's situation to make it more similar to pregnancy, and see what comes of it: When Mary reads the note, it says,

"You will be here for six weeks.
You are safe, and your child is, too.
There is plenty of food and water.
If the child in the cabin dies, you will be rescued immediately."

Does this change Mary's moral obligations at all? No. No matter how she killed the child, whether directly through suffocation or indirectly through withholding breast milk, and no matter how her life would be bettered by it, it is still seriously wrong.

IIIc. Severity of Burden: Is Breastfeeding Similar to Pregnancy?

Some will object that the "Cabin in the Blizzard" story is not sufficiently similar to pregnancy, and therefore the moral intuitions we have about Mary's obligations cannot speak to the obligations a pregnant woman has. Specifically, some believe that while Mary may be obligated to use her body through breastfeeding, that doesn't mean she is obligated to use her body through the uterus. In the former, the baby is outside the body, and in the latter, the baby is inside. In the former, the baby presents a temporary burden every few hours, while in the latter the baby presents a continuous burden for nine months.

I deny that these differences are significant in the way abortion advocates would need them to be in order to show that the *de facto guardian* obligation doesn't apply to pregnancy and therefore abortion is justified. Sure, pregnancy presents a continuous burden while breastfeeding doesn't. Many breastfeeding moms, however, point out that breastfeeding is much harder on them physically than pregnancy was. Breastfeeding involves more active, purposeful support of the child than pregnancy because the woman has to stop what she's doing to nurse the child. Many women also report sensitivity, tenderness, and pain caused by nursing. Some women report that they have either too much or too little milk, requiring them to eat a special diet to increase milk supply or to pump in order to relieve the pressure of the milk building up to levels the child doesn't drain during a nursing.

But think back to the "Cabin" story. If we simply adjust it and say that the child is actually chained to Mary such that he is continuously at her breast and needs only to latch on at



his whim, do our intuitions then suddenly shift, and we say, “Oh, well, *now* she can cut him off and starve him.” No.

IIId. The “This Looks a Whole Lot Like Pregnancy” Case

Consider this adjustment to the Cabin story. Mary must stay in the cabin for 40 weeks before being rescued. The note describes what those 40 weeks will hold and as she progresses through the 40 weeks, sometimes her experience is easier than expected, but for much of the time, it is much more difficult. She has to change the child’s diapers and eliminate the child’s waste. Sometimes the smell of the child’s diapers makes her vomit. Other times, she just feels tired. She develops mastitis, which makes feeding the child painful, but not impossible. In addition, imagine that the child cries continually, and the only way to comfort the child is to carry her around continuously. This, along with gaining weight due to an adverse reaction to breastfeeding, has the effect of making Mary feel like she’s carrying around 50 more pounds than normal. The note on the desk also mentions that at the end of 40 weeks, if the child lives, the only way Mary will be able to emerge from the cabin is through 30 hours of difficult work shoveling snow with bare hands while clinging to the child. This snow tunneling will involve her skin and muscles being twisted and strained in incredibly painful ways.

This scenario resembles the severity of burden of a typical pregnancy, but isn’t it obvious that Mary still has a moral and legal obligation to feed the child? Yes. If not, how could any of these changes to the level of burden change her obligation? Remember, the alternative to her having the burden is that the child dies. In light of this reality, it is difficult to conceive of a way in which the burden could be adjusted to change her obligation to feed the child.

IIIe. The “This Is Worse Than Pregnancy” Case

We can imagine adjusting the story again to make the burdens Mary experiences in the cabin worse than the normal pregnancy situation and get the same result. Imagine she had to stay in the cabin for *two* years, or that she constantly felt tired such that it became difficult for her to function, or that she was severely depressed, or that the mastitis is continual and excruciatingly painful. Would her obligation to feed the child change? No. In my view, the only point where the severity of the burden may change her obligation is when it threatens her life.⁶

IIIf. Outside or Inside the Womb?

There is another difference between the Cabin case and pregnancy: Mary doesn’t have the baby inside her body and the pregnant woman does. The abortion advocate might say, “It’s just different because the pregnant woman has the child inside her body.” If it’s “just different,” though, we still need to hear why that’s significant. If the answer is, “It just is,” then we are not compelled to think it is. In contrast, though, there are good reasons to think location is *not* significant.

⁶ I am not intending in this paper to discuss the nature of Mary’s obligations (or the pregnant woman’s obligations) if for some reason her life is in danger.



In the next section on “Sovereign Zone” arguments, I’ll take a short detour to address the possibility that simply being located in the womb (and no other factor) releases the woman from the obligation to feed. Then, I’ll explain how the *de facto guardian* idea, and the obligations a *de facto guardian* has, address the “Right to Refuse” argument (more commonly known as the Violinist Argument), both in the case of rape and in other cases of pregnancy.

IV: Background: Two Kinds of Bodily Rights Arguments

IVa. The “Sovereign Zone” Argument

None of the discussion above has been predicated on a denigration of bodily rights. On the contrary, I believe certain bodily rights arguments for abortion are quite strong and demand careful response. Others are weaker because of the extreme nature of their claims.

Trent Horn, past JFA intern and now speaker for Catholic Answers, divides bodily rights arguments into two types: “Sovereign Zone” arguments and “Right to Refuse” arguments. The Sovereign Zone breed of bodily rights arguments say, “My body is like a sovereign zone. I have an absolute right to do anything I want with anything that is in my body.” As Trent has pointed out, this very extreme claim is difficult to defend in light of clear cases where we don’t seem to have the right (legal or moral) to do anything we want with our bodies and anything in them. The wrong of Aliza Shvarts’s abortion-is-art project, the wrong of using thalidomide when pregnant, and the wrong of killing a child who has been transferred out of the mother’s uterus to an artificial womb and back to the mother’s uterus (what Horn calls the “deadly transfer” case) all indicate that we don’t have a right to do anything we want with anything in our bodies.

“Right to Refuse” arguments, on the other hand, aren’t so easily dismantled, especially when they are carefully explained and defended. Judith Jarvis Thomson’s “Violinist” is an example.

IVb. The “Right to Refuse” Argument: The Violinist

Recall Judith Jarvis Thomson’s famous “Violinist” story. It is similar to the “Cabin” story above. In the Violinist story, you are connected to a miniature violinist who will die if you do not use your body to help (he needs your kidney to filter his blood for nine months). In the Cabin story, the child will die if Mary does not use her body to help (the child needs Mary to deliver nourishment to her via her breast for six weeks). Yet, our intuitions seem to lead us in different directions.

With the Violinist story, although we may think staying hooked up would be heroic, or possibly virtuous, or possibly the right thing to do, few people say that it should be illegal to unhook. To put it another way, our intuitions lead us for some reason to say that one cannot be forced by law to stay hooked up to the violinist. With the Cabin story, on the



other hand, our intuitions lead us to say one *can* be forced by law to “hook up” and breastfeed the infant.

On the face of it, the Violinist story seems very similar to pregnancy. In both cases, one human is hooked up to another human who needs assistance from the person’s body to live. If the two cases are parallel in all of the relevant ways, then, just as the kidnapped person has the legal (if not moral) right to unhook from the violinist, then a woman should have the legal right to “unhook” from her unborn child.⁷ Therefore, the argument goes, abortion should be legal.

V: Responding to the Right to Refuse Argument (The Violinist)

Va. Parallels that Aren’t Parallel

Responses to the Violinist argument typically attempt to show that while the Violinist story and pregnancy appear to be parallel, they are *not* parallel in certain morally or legally relevant ways.⁸ Let’s discuss a few of those “parallels that aren’t parallel.”

Before we do, let’s limit our discussion from this point forward by focusing on the strongest version of the Violinist argument, which I take to be a legal one: Should you be forced by the state to stay hooked up to the violinist? It’s important to cast the argument this way because some responses to the Violinist may apply to a moral version of the argument only. And while it’s important to determine what is right or wrong concerning abortion, the most controversial aspect of the debate about abortion is about whether or not it should be legal.⁹ So, successful responses to the Violinist will have to apply not only to a moral version of the argument, but also to a legal one as well. Essentially, we can’t find out if the Violinist story can shed light on the question, “Should you be forced by the state to ‘stay hooked up’ to your unborn child?” unless we look at the Violinist story in legal terms. Putting the argument in legal terms is putting the argument in its strongest form possible, because the argument then is making the *least extreme claim*.¹⁰ It seems obvious that a human being has a basic right to bodily autonomy, and it seems obvious that that basic right entails the idea that the state can’t force one human to use her body to sustain another human’s life.

⁷ The argument assumes that the child is considered a full human person morally and legally.

⁸ As far as I know, the “parallels that aren’t parallel” frame comes from Gregory Koukl’s “Unstringing the Violinist” article (<http://www.str.org/site/News2?id=5689>), which originally appeared in Stand to Reason’s *Clear Thinking* journal.

⁹ Witness, for example, the great popularity of JFA’s on-campus poll, “Should Abortion Remain Legal?” Sometimes we receive nearly a thousand responses in a given two-day period. Many times we hear respondents say, “I think abortion is bad, but I think it should be legal.” In fact, I’ve heard this sort of statement so many times, I’ve come to believe that it is really the standard pro-choice view.

¹⁰ I owe this point to Trent Horn. I suppose another way to put his point is this: the smaller the claim, the bigger the headache it creates.



Vb. Three “Parallels that Aren’t Parallel”

Consider three “parallels that aren’t parallel” commonly discussed by pro-life advocates.¹¹ For reasons I’ll mention shortly, there are liabilities to focusing a case against the violinist *only* on these (individually or taken together).¹²

- A. **Unhooking vs. Dismemberment:** While perhaps the law should permit you to unhook from the violinist, the only way to unhook from the unborn child is to dismember him. Since your right to your body doesn’t entail the right to reach over and dismember the violinist, the woman’s right to her body doesn’t entail the right for her to dismember her unborn child.

This is true as far as it goes, and it may mean that the Violinist fails to justify surgical abortions (which account for the vast majority of abortions currently in the United States), but RU-486 (meaning, the mifepristone component of a mifepristone-misoprostol protocol) is a type of abortion method that *is* very much like unhooking.¹³ It detaches the embryo from the endometrium (uterine lining). If that’s the case, then the unhooking-dismemberment disanalogy dissolves. If that’s the only “parallel that’s not parallel,” the violinist justifies legal abortion at least in the case of RU-486 abortion.

A related difference between the violinist story and pregnancy focuses not on the method of the killing but on the intention of the act. The “parallel that’s not parallel” might be framed as **Withdrawing Treatment vs. Intentionally Killing**. It’s true that any type of abortion, even RU-486, seems to be a case of “intentionally killing” and my action if I unhook from the violinist could be distinguished from that because I am not intentionally killing *him*. Under analysis, though, I fear that this “parallel that’s not parallel” won’t be very helpful in persuading most abortion advocates. Remember that in this section I’m not intending to show that these disanalogies have no value in persuading some. I’m only intending to show that they have liabilities that should lead us to consider alternatives.

Is *withdrawing treatment vs. intentionally killing* a meaningful difference between the violinist and pregnancy? Perhaps, but it is far from obvious that “intentionally killing,” at least in common parlance, is always wrong. And it’s even further from obvious that “intentionally killing” should always be illegal. Now, I put “intentionally killing” in quotes to highlight one aspect of the problem: what does “intentionally killing” mean? Let me give some examples of what many take to be

¹¹ See for example, [Gregory Koukl, “Unstringing the Violinist”](#); Scott Klusendorf, *The Case for Life* (Wheaton, IL: Crossway Books, 2009), pp. 185-201; Frank Beckwith, *Defending Life* (New York: Cambridge University Press, 2007), pp. 172-199.

¹² Whether viewed as individually necessary or mutually sufficient defeaters of the Violinist argument.

¹³ See the paragraph that begins “In medical abortion regimens” here: <https://en.wikipedia.org/wiki/Mifepristone>.



clear cases of intentional killing that are neither obviously wrong nor obviously the sort that should be illegal:

(1) A soldier kills another soldier in a just war. (Let's assume there is such a thing as a just war for the sake of the argument.)

(2) A bystander at a party shoots and kills an "innocent aggressor" or "innocent threat." For example, imagine that reckless pranksters spike George's drink at a party so that he starts hallucinating, but then they place a loaded gun in his hand just to see what will happen. George begins threatening to shoot everyone in the room by pointing the gun at their faces. A bystander shoots him dead, believing that was the minimal amount of force necessary to protect himself and the others at the party.¹⁴

(3) A state worker is ordered to give a lethal injection to a capital criminal who tortured five people to death.

My point in raising these three examples is not to argue that the killing is actually justified in any of them. The point is a pragmatic one: If any of these killings is justified in many people's minds, then it's very questionable whether the "withdrawing treatment vs. intentional killing" distinction will show the average person we're speaking to that unhooking from the violinist is morally right or should be legal while unhooking from the unborn, say, with RU-486, is wrong or should be illegal. Which killings are justified is controversial.

The definitions of "intentional" and "killing" may also be controversial. Notice that each of these cases appears to be a case of intentional killing. Perhaps the precise meaning of "intentional" and "killing" could be discussed, showing that these are either not "intentional" or not "killings." Or, perhaps, one might attempt to show that while one or more of these is a case of *justified* intentional killing, the sort of killing that abortion is is always *unjustified* intentional killing. Whether or not various cases of killing are intentional or justified is unclear to some and controversial to others, so it may prove difficult to rely only on "withdrawing treatment vs. intentional killing" distinction without appearing to beg the question. Let me illustrate.

A few weeks ago I spoke with a student named Jason at the University of Texas at San Antonio. Jason and I covered a lot of ground in the conversation. He went from believing that viability makes the unborn valuable to believing that the unborn is valuable from fertilization. I then outlined for him the violinist argument and proceeded to dismantle it through dialogue with him about its salient points along the lines of what I've argued so far in this paper. Jason was very grateful for this,

¹⁴ I'm indebted to Trent Horn for passing this example on to me.



and confirmed at the end of the conversation that he thinks abortion should not be legal at any time in the pregnancy, even in the case of rape. Now, imagine I took the conversation a different direction when attempting to dismantle the violinist:

Steve: Notice how in the violinist story you are withdrawing treatment from the violinist, which is justified, but with abortion, you would be intentionally killing the unborn.

Jason: I don't see how that's relevant.

Steve: Well, intentionally killing the unborn would be wrong.

Jason: But it doesn't seem to me to be the case that intentionally killing is always wrong.

Steve: Can you tell me a case you're thinking of?

Jason: Killing in self-defense or war. Or how about this. I heard this example in my ethics class: What if someone is drugged at a party and a loaded gun is placed in his hand. The drug makes him start hallucinating and he starts pointing the gun at people's faces and saying he's going to kill them. If someone shoots him, that would be an intentional killing, but it wouldn't be unjust. And it should be legal.

Steve: But it's a justified intentional killing.

Jason: But couldn't abortion be a justified intentional killing?

Steve: No, it's an unjustified intentional killing.

Jason: But Steve, I've taken enough philosophy to smell a rat here. I don't mean to be accusatory or mean, but aren't you begging the question? Isn't this precisely the point at issue, whether abortion is a justified intentional killing?

Now, my point in this imaginary dialogue is not to say that the defender of the "withdrawing treatment vs. intentional killing" distinction is being adequately represented by the words I've placed in Jason's mouth here. And I'm not saying that the defender of this distinction might be able to make a case that the distinction is meaningful, at least if certain presuppositions are in play in the conversation. My point is that it's not a very reliable route for many people of many worldview persuasions. And if we're attempting to make our case not only that abortion is wrong but should be illegal, then we shoulder an even heavier burden to make a case that's accessible to most people.



B. ***Artificially Hooked Up vs. Naturally Hooked Up and My Kidney Wasn't Intended to Filter the Violinist's Blood vs. My Uterus Was Intended to Gestate My Child:***

These “parallels that aren't parallel” are similar in that they both focus on the teleology of bodily organs. While some of us individually find this persuasive, because teleological arguments probably require natural law or theological assumptions that many in our democratic society won't hold, the value of these disanalogies is questionable.

- C. ***Stranger vs. Parent:*** Perhaps the most glaring “parallel that's not parallel,” is the fact that in the Violinist story, the violinist is not your child, while in pregnancy, the unborn is the woman's child. The woman is the parent. It does seem that parents have special moral and legal obligations to their children, but if we simply adjust the Violinist story, it's easy to see that parents aren't obligated legally or morally to give their children just any sort of assistance that their child needs. For example, a parent is not obligated to become a kidney dialysis machine to sustain the life of her child. So, imagine the Violinist is your child. Are you now legally obligated to stay connected to him for nine months and filter his blood? No.

To understand the stakes of relying solely on the *Stranger vs. Parent* disanalogy to respond to the Violinist, consider the following point Matt McKinley made in an unpublished paper for Justice For All: If the only reason you must stay hooked up to the unborn child (and not to the Violinist) is because you are the unborn child's parent, then you need to give some explanation of what a parent is. If you then define “parent” in terms of consent, it won't have a bearing on many pregnant women, for many have not “consented” to parental obligations. If on the other hand you define “parent” in terms of biology only (i.e. something like a certain DNA relationship), then you will have to countenance a real case from Wales in which a woman was implanted with an IVF embryo that was not biologically related to her.¹⁵ If the only reason she must stay hooked up to her unborn child is the fact that the child is biologically related to her, and the child is not biologically related to her, then in that case she should be able to have an abortion.¹⁶

My colleague Josh Brahm writes,

McKinley's story seems to show that a biological relationship to the child in question alone cannot be a *necessary* condition for the kind of obligation that

¹⁵ Jo Macfarlane and Brian Radford, “'In ten seconds our world was shattered': Distaught IVF couple discover their last embryo was given to the wrong woman - and then aborted,” *Daily Mail Online*, June 14, 2009. See http://www.jfaweb.org/Daily_Mail_Article_2009_06.

¹⁶ The same problem with biological relationship exists with any IVF procedure in which a donor egg is used. The child does not have a biological relationship to the mother. One might adjust the definition of “biological relationship” to mean, “joined by some bodily connective tissue” or something like this, but why should we believe that this is what “parenthood” is, and why should we believe special “parental” obligations attend it in virtue of it being a biological tissue connection?



would lead us to conclude that a pregnant woman should not be allowed to abort. Perhaps the biological relationship parents have to their children are *sufficient* conditions to obligate a woman to not abort her child, but it's clearly not a *necessary* condition.

There's another reason the biological-parental obligation argument is often unconvincing to pro-choice people: many pro-choice people believe that merely having a biological relationship to a child is not *sufficient* to making someone a parent in any meaningful sense. For example, they may believe that being a parent is consent-based, that you sign an invisible contract to care for this child when he is born and not offered for adoption. If pro-life people are not aware of this alternative definition of "parent" that is used by many in our society, we are in danger of equivocating when talking about parental obligation.

A few examples demonstrate why many people think there is more to being a parent than having a biological relationship to a child:

- Consider a rape victim who becomes pregnant, carries her child to term, and gifts the child for adoption as soon as the child is born. The adopting couple lovingly cares for the child for 18 years. Who is the mother?
- Consider a married couple who decides to use in vitro fertilization because of the wife's infertility. They use the husband's sperm to fertilize an oocyte from an anonymous donor, and then implant the embryo into the wife's body. She carries the child to term and she and her husband lovingly care for the child for 18 years. Who is the mother?

Many people would say that in both cases, the wife is the mother in the meaningful sense of the word that includes *the obligations of parents*. For the same reason, if an irresponsible young man impregnates his girlfriend and dumps her when he learns she is pregnant and never pays child support, many people disdainfully call him a "sperm donor" to signify that he is not shouldering the responsibilities he actually has as the "father."

This paper is not arguing that parental obligation does not exist for women that have a biological relationship to their child. We are simply noting that the idea that a person has a parental obligation simply in virtue of a certain biological relationship to the child is controversial to many pro-choice people because they believe the definition of the word parent that's operative in the term "parental obligation" is something distinct from biology.



Vc. Another “Parallel that Isn’t Parallel”

- D. **Kidnapped vs. Responsibility:** Trent Horn explains another important “parallel that’s not parallel” in Justice For All’s *Abortion: From Debate to Dialogue – The Interactive Guide* on page 108-110.

In the case of a stranger who will die unless I donate blood or bone marrow, I am not obligated to help him because I was not involved in how he became ill. Likewise, if I’m the one who’s been kidnapped in Thomson’s violinist scenario, the reason the violinist is dying has nothing to do with my actions. He has been connected to my body by the plotting of the “Society of Music Lovers.” But why is the fetus connected to a woman’s body in pregnancy? Approximately ninety-nine percent of the time, it is because she engaged in an act (sexual intercourse) that is known to create dependent people (i.e. unborn children). In normal cases of pregnancy, both the mother and father resemble the “Society of Music Lovers” more than the kidnapped kidney donor in creating an innocent child and causing that child to be dependent on a woman’s body to live. If I am **responsible**, or freely engaged in an activity that I knew had the possibility of creating a helpless human life, then I owe that human life whatever assistance she needs to survive.

Horn then references thought experiments that illustrate the responsibility objection: the reverse violinist¹⁷ and the baby-making machine.¹⁸

It’s common for people in my experience to accept that “the responsibility objection” defeats the violinist in the vast majority of abortion cases, but it clearly does not hold in the case of rape. If a woman is raped and gets pregnant, after all, she willingly did nothing related to bringing the child into existence.

(continued on following page)

¹⁷ Tony George, “Good Samaritan on Life Support,” Justice for All, 2009. Available online at: www.jfaweb.org/Training/George_Anthony_GSonLifeSupport.pdf.

¹⁸ Scott Klusendorf, *The Case for Life* (Wheaton, IL: Crossway Books, 2009), p. 195.



VI: Tying Our Hands Behind Our Backs: Responding to LRRR

Via. The Legal Right to Refuse in the Case of Rape (LRRR)

Taking these factors into consideration, let's assume the following case for the sake of discussion:

- A woman was raped.
- She got pregnant.
- She's two weeks along (since fertilization; four weeks since Last Menstrual Period)
- The woman has not consented to parental responsibilities in any way
- She is considering an RU-486 abortion.

Should it be legal for her to have the abortion? The Violinist argument would affirm that she should, because each of the disanalogies listed in the previous section either don't apply to this case or face significant persuasive challenges, either as necessary or sufficient defeaters of the Violinist argument.

- (1) she wants to use a method that truly unhooks the child,¹⁹
- (2) teleological concerns are difficult to make into moral concerns (much less legal ones)
- (3) she may not have a parental obligation because she hasn't consented in any way to the initial act that produced the "parenthood" (assuming the person we're talking to refuses to define parenthood in non-consensual terms), and because...
- (4) she isn't responsible for the child (she didn't consent to the sexual act that created the child in a needy condition for which she would have been responsible had she consented to sex initially)

Vib. Parallels that Aren't Parallel...In Most Cases...It Depends.

Each of the disanalogies reviewed above is legitimate as far as it goes. Please review the footnoted resources for a more detailed defense of these disanalogies. So in what follows, we're not discounting the strengths of these strategies against the Violinist. But let's realize that it appears that none of them cover all cases of abortion (real or theoretical), at least not conclusively for most people. In following the argument where it leads, we should either admit that abortion should be legal in some cases, find a way for some or all of these disanalogies to work better together than they work apart, or find another parallel that's not parallel, one that covers all cases of abortion.

We reject the first two approaches. We don't think the Violinist necessitates "biting the bullet" on certain abortions (e.g. the IVF case in which there isn't a biological connection to the child). Neither do we think that the disanalogies above work better together as a cumulative argument to cover all cases of abortion. The reason is as simple as the problem

¹⁹ Even though the abortion would be an intentional killing, the concerns I shared in the previous section about justified intentional killings and the definition of "intentional" present at least pragmatic hurdles, if not principled ones.



of “Leaky Buckets.”²⁰ If each of these disanalogies on it’s own doesn’t apply to certain abortion cases or is unpersuasive to the listener, then the disanalogies won’t work better together than they do individually. If each of these reasons to deny the Violinist is seen as a bucket, each is leaky, so putting them together won’t make them hold more water than they do apart.

Some of the disanalogies from the list above might be salvaged as a “this is all you need” response to the Violinist. For example,

- (1) The *unhooking vs. dismembering* and might successfully disarm the Violinist, at least in cases of surgical abortion. In addition, the distinction between *withdrawing treatment vs. intentionally killing* relies on a long history that “intentional killing” is prima facie wrong, so it may be helpful, especially if certain worldview assumptions are in play.
- (2) The teleology of the uterus and similar disanalogies might successfully disarm the Violinist if certain assumptions are agreed upon. In addition, teleological arguments have a long history and should not be dismissed out of hand simply because they are controversial.
- (3) Parents sometimes have extreme legal obligations to children, so those obligations may include some sort of bodily obligation. In addition, if a certain definition of “parent” is in play in the conversation, it may be more helpful against the Violinist.
- (4) We think the Responsibility Objection is devastating to the Violinist and, if we make a concurrent case that the unborn is a full human being with a right to life, it’s devastating to almost all abortions.

In addition, it’s important to note here that putting things in moral terms is certainly important in discussions about abortion, so we shouldn’t get in the habit of disregarding wholesale those arguments against the Violinist that are morally construed simply because they may not apply to this narrowly defined legal version of the argument.

We think the project of adjusting and re-explaining each disanalogy above may hold promise for refuting the legal version of the Violinist argument. Far from suggesting any of these disanalogy arguments be thrown out, we are here offering misgivings about them as necessary or sufficient defeaters of the Violinist in every case of abortion. To employ any of these disanalogies against the strongest version of the Violinist, though, each will have to address the challenges we’ve outlined.

Still, we would like to propose a different strategy, one akin to a fighter tying both his hands behind his back and still participating in a match. In other words, let’s set all of these disanalogies aside and focus on another difference between the Violinist story and pregnancy: “medical treatment vs. feeding and sheltering.”

²⁰ See Stephen Wagner, “The SLED Test – Four Leaky Buckets,” *Abortion: From Debate to Dialogue – The Interactive Guide*, p. 94, for more on this: www.jfaweb.org/Training/ADD/ADD_IG_SLEDLeakyBuckets.pdf



Vlc. One More Parallel that Isn't Parallel...in Any Case

E. ***Medical Treatment vs. Feeding and Sheltering:***²¹ Let's look again at the Cabin story that begins this article. In the Cabin story, Mary is a *de facto guardian* of a child, and as such, she has the same moral and legal obligations as a parent (although temporary). She should feed the child, even if she must use an intimate body part (her breast) to accomplish it. In the Violinist story, you are not the *de facto guardian* because there appear to be others in the story who could help him, at least in terms of certain kinds of care. You are the only one who can filter his blood, we are told, but there are others who can give him the other kinds of care he needs. Let's adjust the Violinist story, then, so that you *are* the *de facto guardian* and see what comes of it.

Imagine you are the only person in the vicinity of the violinist and the violinist is a child or disabled person. In this case, you would be the *de facto guardian*. Imagine, for example, that when you wake up next to the Violinist, you are in a deserted hospital, you have plenty of food next to your bed, and you are connected to a violinist who is not related to you but who recently became a quadriplegic. In this case, you are obligated (morally/legally) to feed and shelter the violinist, but you are not obligated (morally/legally) to give him your body as medical care.²²

Now, the question is, "Is pregnancy more like breastfeeding or kidney dialysis?"

Vld. Is Pregnancy More Like Feeding or Kidney Dialysis?

How is the body sustaining the life of the child during pregnancy? It's obvious that the mother is at least providing the necessary shelter and food for the child, but is she doing more, in a way that is akin to kidney dialysis?

It doesn't really matter. Pregnancy is at least feeding. If the only way to feed a kid is through getting hooked up like kidney dialysis, you'd still have to do it.

Imagine that Mary wakes up in the cabin and the baby is attached to her such that a short tube is protruding from Mary's stomach and entering the baby's stomach. Assume Mary has no formula but neither is she lactating. The only way for her to feed the baby is through the apparatus connecting them. The note tells her that she can remove the apparatus, but then the baby will not be able to eat, so it will starve to death. Does Mary have the moral or legal right to unhook? My intuitions are unchanged.

²¹ We owe the emphasis we've come to place on pregnancy as a form of feeding and sheltering the embryo to Matt McKinley.

²² Note, thinking you are the *de facto guardian* of the violinist does nothing to compromise the *de facto guardian* concept (it doesn't show it has unacceptable implications), so it does nothing to defend abortion.



VIe. Conclusion: The Pregnant Woman Is Obligated to Stay Pregnant

Because the pregnant woman is a *de facto guardian* of a child, she should use her body to feed the child and can be expected by law to do so. She is obligated to stay pregnant.

VII: Taking Our Hands Out from Behind Our Backs: Making the Cabin Story More Like Pregnancy and Abortion

VIIa. What If Mary Did Find Her Child in the Cabin?

Let's adjust the story with regards to one more detail. Imagine that when Mary goes looking for the infant she gave birth to just a week previous, she *does* find him. She then must weather the storm for six weeks with her own infant. Imagine, though, that when she emerges, her infant son is dead. The police question her, but she says that the kidnapping and isolation caused her so much stress, and before the cabin incident the breastfeeding had been getting too difficult, so she let her son die.

Perhaps our intuitions are strongest here that Mary is obligated morally and (should be) legally to feed her own child by breastfeeding him. Similarly, if the unborn is a human being, he must have a parent, and isn't it evident that the woman carrying him is the most likely candidate? And if the woman is the parent of the child inside of her, then, she is surely has the obligation to feed her child by staying pregnant.

VIIb. What If Mary Decided to Slice Up the Child?

Showing that there isn't much of a difference between killing and letting die has become something of a philosophical pastime. And even if it is the case that there is no significant difference between killing and letting die, it seems that the distinction can lend something to our discussion here.

Think back to Mary's situation. The note says, "If the child dies, you will be rescued immediately." Someone may defend her moral or legal right to withhold her body from the child, starving the child, but who would defend her moral or legal right to slice up the child or to pull the child apart with metal implements? Surely that's not right. In the same way, while you might have the right to unhook from the Violinist, do you have the right to do so if the only way to do so is to tear him limb from limb?

Relating this to abortion, while I think this paper has shown it's not a tenable position, let's say someone still believes a woman pregnant from rape can (morally or legally) withhold her body from the child. Can this person further argue that if it's necessary to vindicate her bodily rights, she can slice the child up?



VIIc. What If Mary Consented to Be a Part of the Experiment with Full Disclosure?

Imagine that Mary signed up to be a part of an experiment in which she knew she might²³ be placed in a cabin with an infant and the infant would need her body to survive for six weeks. Would she be morally or legally obligated to feed the infant in this case? While the consent isn't necessary to obligate her (this is the whole point of the *de facto guardian* idea) it certainly is sufficient to obligate her!

If this is true, then this underscores the value of the Responsibility Objection to the Violinist. If one willingly engages in an act (participating in a study) which one knows may bring about a situation where a child needs one's body to live, and if that child only needs food and shelter, then one is obligated. In the same way, if a woman engages in sex willingly, and she knows (or should have known) that the act may bring about a situation in which a child needs her body to live, and all the child needs is food and shelter, then the woman is obligated.

In other words, as a *de facto guardian*, if the woman pregnant from rape is morally and legally obligated to give food and shelter to a child in her care (stay pregnant), how much more is a woman pregnant from *consensual sex* morally and legally obligated to give that same food and shelter to the child in her care (stay pregnant).

VIIc. What If Mary Experienced a Level of Burden More Akin to Most Pregnancies?

One might argue that the Cabin story that begins this article actually is not analogous to pregnancy in that Mary experiences *worse* burdens than a typical pregnancy. Examples might be her feeling of isolation, the pain from breastfeeding, the need to consciously focus on feeding the baby (which is not present in the same way in pregnancy). Therefore, if *Mary* has obligations to feed the child, then surely the pregnant woman does as well.

VIII: Communication Tips – *De Facto Guardian and Up*

My colleague Timothy Brahm notes that the film *Up* includes a memorable example of a *de facto guardian*. Carl is an elderly gentleman, and the house in which he built memories with his wife (now deceased) is about to be demolished under imminent domain. Since he is good with balloons, he uses hundreds of them to lift his house off the ground to take that vacation to South America that he and his wife were never able to take while she was alive. Thousands of feet in the air, he hears a knock at the door. An annoying boy scout named Russell, plastered to the front of the house and fearing that he will fall to his death, says, "Please let me in." Carl says no, and there's a comedic pause. Then he opens the door and says, "Oh, alright," and let's Russell come inside.

²³ Josh Brahm notes, "I think the changes below ["might" instead of "will"] are necessary to make the situation more parallel to pregnancy. The way it is currently worded ["will" in a previous version] would only apply to the person purposely getting pregnant from IVF or something. But those women don't typically want an abortion. I think the responsibility objection is strong because it works even for the person taking a gamble, even a 1 out of 100 shot that no baby will begin to exist.



Does Carl have an obligation to give Russell food and shelter? Yes, because Carl is the only one in the vicinity who can help this child. What accounts for this intuition? Isn't it that as a *de facto guardian*, Carl has the same obligations as Russell's parents, though temporary? The story is very similar to the story of Mary with which we began. Both Carl and Mary have an obligation to feed and shelter the child in their care, and those obligations arise from the situation of being a *de facto guardian*.

Some may object to referencing *Up* in making an analogy to pregnancy and abortion, since it's easy to conclude that in doing so we're comparing a woman's body to Carl's house. Although I believe the *Up* story is sufficiently similar to pregnancy to help some people think differently about our obligations to the unborn, and although the analogy also compares Carl needing to use his body to feed Russell (not just his house), I think the main value of the *Up* story is to give people a general concept of *de facto guardian*. The disanalogies with pregnancy (Carl is a man, Carl doesn't have to use an intimate part of his body to feed Russell, Russell is inside or outside the house and not Carl's body) may limit how helpful the story is in conversation. This is why we began this paper with the Mary and the Cabin in the Blizzard. The story is as close to pregnancy as possible. Our suggestion, however, is to use both stories, especially because we have found the *Up* story to energize conversations due to how memorable and visual the story is for people.

Addendum: Revisions List

v02 (4/14/2013): fixed grammatical errors; fixed a few word choices and phrases for clarity; made alterations to the discussion of withdrawing treatment vs. intentional killing in Vb. (for clarity); made alterations to Section VIb. for clarity.

v03 (4/20/2013): fixed various misspellings and grammatical errors; changed footnote 15 to address a broken link issue; removed last sentence in Section Vb.A. because it was a remnant from an early draft; for clarity, removed the quotes around the two types of parenthood referred to in the first paragraph in Section IIa. (5/17/2013): fixed pronoun confusion regarding the infant son ("him") and the sex of the unborn child ("he") in Section VIIa.

